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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Application of

13 EURASIAN NATURAL
14 RESOURCES CORPORATION
15 LTD.,

16 Applicant.

CV 18 No 80041 MISC.

APPLICATION OF EURASIAN
NATURAL RESOURCES
CORPORATION FOR DISCOVERY
FOR USE IN A FOREIGN
PROCEEDING

[DECLARATION OF MAGNUS
BOYD FILED CONCURRENTLY]

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APPLICATION FOR DISCOVERY FOR USE IN FOREIGN PROCEEDING

JURISDICTION

This Court has jurisdiction over this application pursuant to 28 U.S.C. § 1782 because it is an application for discovery for use in a foreign proceeding..

INTRADISTRICT ASSIGNMENT

This application is assigned to this District because the witness that Applicant wishes to subpoena is located in San Francisco, CA.

APPLICATION

8 Applicant Eurasian Natural Resources Corporation Ltd. (“ENRC”) hereby
9 applies for an order permitting discovery under 28 U.S.C. § 1782 for use in a foreign
10 judicial proceeding in the United Kingdom.

11 Section 1782 permits an application for discovery “upon the application of any
12 interested person and may direct that the testimony or statement be given, or the
13 document or other thing be produced, before a person appointed by the court”. 28
14 U.S.C. § 1782.

Section 1782 discovery does not require a specific pending judicial proceeding; it is enough that the proceeding is “within reasonable contemplation”.

¹⁷ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

18 “Three elements must be satisfied before 28 USC § 1782 may be invoked: (a)
19 the person from whom discovery is sought resides, or can be found, in the district
20 where the application is made, (b) the discovery is for use in a proceeding before a
21 foreign tribunal, and (c) the application is made by a foreign or international tribunal
22 or ‘any interested person.’” *California Practice Guide: Federal Civil Procedure*
23 *Before Trial California & 9th Circuit Editions* § 11:1290 (The Rutter Group 2017)
24 (“Rutter Group Federal Procedure”).

In this case, the discovery will be directed to Danny Fortson, an individual residing and working in this judicial district. The discovery is for use in a contemplated action in the United Kingdom. And the application is being made by an “interested person”, ENRC, who is attempting to obtain relevant evidence for a

1 prospective claim.

2 Relief under Section 1782 is discretionary. Factors to be considered in
 3 exercising the Court's discretion include the need for the federal court's assistance,
 4 the receptivity of the foreign tribunal to the federal court's assistance, and the scope
 5 of discovery sought, including whether it attempts to circumvent restrictions imposed
 6 by the foreign court. *Rutter Group Federal Procedure* §§ 11:1305.1-11:1305.3.

7 However, there is no requirement that the discovery must be available under
 8 the foreign court's rules before it may be ordered by a US District Court. *Intel*, 542
 9 U.S. at 261.

10 In the case at bar, there is a need for federal court assistance because Fortson
 11 lives and works in the Northern District of California and is arguably not amenable
 12 to process or personal jurisdiction in the United Kingdom. Further, the documents
 13 and information that are sought are within his possession, custody, and control and
 14 are thus within the jurisdiction of this Court and may not be within the jurisdiction of
 15 the UK courts.

16 The United States and the United Kingdom enjoy a very good diplomatic
 17 relationship and there is no reason to believe that the UK courts would interpose any
 18 sort of objection to a District Court ordering discovery.

19 Finally, this discovery is relevant to potential claims that ENRC is reasonably
 20 likely to bring. ENRC retained the law firm of Dechert LLP to provide legal services
 21 relating to the investigation of a whistleblower's claim that one or more ENRC
 22 subsidiaries engaged in wrongdoing. ENRC eventually terminated the retainer.
 23 Soon thereafter, a letter written by Dechert LLP to ENRC and containing
 24 confidential information was leaked (the "Letter"). A copy of the confidential letter
 25 was provided to Fortson who wrote an article published in *The Sunday Times* which
 26 referred to the fact and content of the Letter. The termination of Dechert LLP's
 27 retainer was acrimonious and Dechert LLP thus had an apparent motive to leak the
 28 Letter. The leaking of the Letter caused damage to ENRC and ENRC is reasonably

¹ likely to bring an action in the English courts against the leaker(s) once discovered.

2 By this application, ENRC seeks discovery from Fortson, the journalist who
3 authored the article in the *Sunday Times* that quoted from the Letter. The Letter
4 contained privileged and confidential information obtained from ENRC and which
5 ENRC believes was transmitted to Fortson in violation of Dechert LLP's contractual
6 and legal duties to maintain information in confidence. The publishing of the
7 confidential information contained in the Letter was highly prejudicial to ENRC.

8 ENRC seeks the discovery sought by this application from Fortson so as to
9 establish a claim that Dechert LLP violated its duty to safeguard confidential
10 information. This discovery being sought in this Court because Fortson can be found
11 in this district, and is therefore not being sought to circumvent any restrictions on
12 discovery imposed by the High Court.

13 Accordingly, ENRC respectfully requests that this Court grant the relief and
14 permit the service of a subpoena for documents and testimony.

16 | Respectfully submitted,

17 | DATED: February 23, 2018

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By Dick Agar

Attorneys for Applicant